PUBLIC PROSECUTOR

v.

SULAIMAN AHMAD

HIGH COURT MALAYA, TAIPING
ABDUL MALIK ISHAK JC
[CRIMINAL APPEAL NO. 51-13-92 OF 1987]
20 OCTOBER 1992

CRIMINAL PROCEDURE: *Accused charged under s. 12(2), (3) of the Dangerous Drugs Act 1952 - Possessed 0.85g heroin - Caught red-handed - Pleaded guilty - Sentenced to two years' imprisonment with one year of police supervision - Whether Magistrate adequately considered public interest when sentencing.*

CRIMINAL PROCEDURE*: Sentence by Subordinate Courts - Circumstances when the High Court would interfere.*

The Public Prosecutor appealed against the sentence that was imposed by the learned Magistrate on the respondent, who had pleaded guilty to a charge of possessing 0.85g of heroin under s. 12(2) and punishable under s. 12(3) of the Dangerous Drugs Act 1952, as being grossly and manifestly inadequate.

The respondent, who was caught red-handed with the drugs, had been sentenced to two years imprisonment followed by one year of police supervision.

The Public Prosecutor also alleged:

(i) that the respondent had five previous convictions for dangerous drugs offence;

(ii) that the learned Magistrate had failed to adequately consider the public interest and was unduly influenced by the respondent's guilty plea; and

(iii) that the gravity of the offence and the facts of the case were ignored.

Held:

[1] The burden of proving an offence is on the prosecution, and the duty to determine an appropriate sentence is on the Court. However, both the prosecution and the defence may assist the Court by forwarding submissions pertaining to sentence but the final decision and the sentence to be imposed is within the Court's sole jurisdiction.

[2] Even the plea of guilty of a hardened criminal (as the respondent himself had admitted to be) must be treated as a mitigating factor (*Saw Soo Kim v. PP*).

[3] The use of police supervision orders should be sparingly used by Magistrates and should likewise be restricted to the most appropriate or suitable cases. In the instant appeal, the order of one year of police supervision commencing immediately on the expiration of the two years' imprisonment passed by the learned Magistrate was solely to curtail the respondents tendency to promote himself to a more serious crime and therefore justified and appropriate when considering the respondents previous drug convictions.

[4] The sentence imposed by the learned Magistrate should not be disturbed, as he had considered all relevant factors and the sentence imposed was in the circumstances according to law.

[5] The appeal by the Public Prosecutor was dismissed and the sentence of the learned Magistrate was accordingly affirmed.

[Appeal by DPP against sentence dismissed. Sentence by learned Magistrate affirmed.]

Cases referred to:
Kenneth John Ball [1951] 35 Cr App R 164 ***(refd)***
PP v. Teh Ah Cheng [1976] 2 MLJ 187 ***(foll)***
Liow Chow & Anor. v. PP [1939] 8 MLJ 170 ***(foll)***
PP v. Fam Kim Hock [1957] 23 MLJ 20 ***(foll)***
Saw Soo Kim v. PP [1975] 2 MLJ 134 ***(foll)***
Melvani v. PP [1971] 1 MLJ 137 ***(foll)***
PP v. Zaini [1964] 30 MLJ 221 ***(dist)***
PP v. Jafa bin Daud [1981] 1 MLJ 315 ***(not foll)***
Abdul Wahab v. PP [1970] 2 MLJ 203 ***(refd)***
PP v. Haled [1981] 2 MLJ 211 ***(refd)***
Zakariya bin Man v. PP [1985] 2 MLJ 221 ***(refd)***
Roslan bin Haji Yahya v. PP [1985] 2 MLJ 218 ***(refd)***
Re Bakar bin Ahmad [1959] MLJ 256 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 12(2), (3)
Criminal Procedure Code, ss. 295(i), 296, 297

Other sources referred to:
Halsbury's Laws of England (Hailsham Edn.), Vol. 9, para. 365
Halsbury's Laws of England, 3rd Edn., Vol. 10 p. 487

For the Public Prosecutor - Murtazadi Ahmad, DPP
For the Respondent - In person

JUDGMENT

Abdul Malik Ishak JC:

This is an appeal by the Public Prosecutor against the sentence passed by the learned Magistrate, Magistrate's Court, Selama, Perak, on the respondent who was charged as follows:

> Bahawa kamu pada 25 September 1986 jam lebih kurang 9.15 pagi di rumab No. 31, Peringkatl Feldal jok Redang Panjang Selama, dalam dacrah Solama, dalam Negeri Perak, telah didapati memiliki 0.85 gram dadah berbabaya iaitu heroin dan olch yang demikian itu kamu telah melakukan suatu kesalahan di bawah s. 12(2) dan bolch dihukum di bawah s. 12(3) Akta Dadah Borbahaya No. 3011952.

The respondent pleaded guilty to the charge and was duly convicted and sentenced to two years imprisonment to be followed by one year of police supervision.

The facts adduced by the prosecution and admitted by the respondent are briefly that at about 9.15 a.m. on 25 September 1986 a party of police officers headed by Inspector Abu Bakar raided house number 31, Peringkat 1, Felda Ijok, Redang Panjang, Selama and arrested the respondent who was, at the material time, alone and seated on the floor of his bedroom filling powder suspected to be drugs into a plastic straw. The police seized the plastic straw together with three other plastic straws also filled with powder suspected to be drugs. The contents of the plastic straws were analysed by the Government Chemist and confirmed to contain 0.85 grammes of heroin. In the same room the police also confiscated:

(a) a rolled one dollar note;

(b) a cigarette box containing nine empty plastic straws;

(c) nine empty plastic straws;

(d) two small knives;

(e) one small candle;

(f) one plastic packet containing fourteen empty plastic straws;

(g) one green coloured plastic pail;

(h) one box of "Gold Flake" cigarette;

(i) two pieces of silver coloured foils;

(j) a wallet containing fifteen ringgit; and

(k) a bag of clothings.

In short, the respondent who was alone in the said house, was caught red handed with the dangerous drugs.

The learned Deputy Public Prosecutor contended that the sentence was grossly and manifestly inadequate bearing in mind that the respondent had five previous convictions, all of which were for possession of dangerous drugs. It was also contended that the learned Magistrate failed to adequately consider public interest. It was further contended that the learned Magistrate failed to appreciate the gravity of the offence and was unduly influenced by the respondent's plea of guilty. Lastly, the learned Deputy contended, with great vigour, that the learned Magistrate had failed to take into account the facts of the case.

I must lay stress that the burden of proving an offence is on the prosecution, the duty to determine an appropriate sentence is on the Court. Both the prosecution and the defence may assist the Court by forwarding submissions pertaining to sentence, but the final decision and the sentence to be imposed is within the Court's sole jurisdiction.

The definition of sentence is found in the *Concise Oxford Dictionary*. It is defined as punishment allotted to persons condemned in a criminal trial. Sentencing can be said to be the act of imposing punishment in such criminal trial.

There is no simple mathematical formula for sentencing. A variety of factors must be taken into account according to the circumstances of each individual case. A delightful analysis of the classic principles of sentencing and general aspects of punishment is set out in *Halsbury's Laws of England* (Hailsham Edn.), Vol. 9, para. 365:

> The Court, in fixing the punishment for any particular crime, will take into consideration the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the offender, the provocation which he has received, if the crime is one of violence, the antecedents of the prisoner up to the time of sentence, his ago and character.

Yet another classic is the oft-quoted case of *Kenneth John Ball* [1951] 35 Cr. App. R. 164. There the appellant aged 23 years had a bad record. His friend (the co-accused) aged 29 years also had a bad record. Both were accused of three offences of burglary but because there were exceptional matters affecting the character of the co-accused, he was placed on probation for three years; the appellant was sentenced to five years' imprisonment. On appeal, the Court of Criminal Appeal decided not to interfere with the sentence of the appellant. Hilbery J had this to say:

> In deciding the appropriate sentence a Court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter

> others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honestlife. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the Court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the Court has the right and the duty to decide whether to be lenient or severe.

The learned Judge in *Ball's* case cannot be said to lay down any rules on public interest but rather was merely making an observation on what public interest would be in relation to the 29 years old offender who had exceptional antecedents and character. I am of the considered view that public interest varies according to the time, place and circumstances of each case including its nature and prevalence. Therefore, what is deemed to be of public interest in one place may not be so in another. In short the concept of public interest is very fluid.

The learned editors of *Halsbury's Laws of England*, 3rd Edn., Vol. 10 at p. 487 state as follows:

> The object of punishment is the prevention of crime, and every punishment is intended to have a double effect, namely, to prevent the person who has committed a crime from repeating the act or omission and to prevent other members of the community from committing similar crimes.
>
> As regards the particular offender there are three ways of providing by punishment against the recurrence of an offence:
>
> (1) by taking from him the power of offending (incapacitation);
>
> (2) by taking away the desire of offending (reformation);
>
> (3) by making him afraid of offending (intimidation).

In respect of offences under the Dangerous Drugs Act No. 30/1952 (Act 234) (the said Act), a gradual change in the attitude of the Legislature in the last few years can be discerned. The said Act has been amended a number of times. For example, the penalty for the offence of possession of any dangerous drugs under s. 12(2) of the said Act was increased from a maximum of RM10,000 fine to a maximum of RM20,000 fine and the maximum imprisonment was increased from three years to five years (see Act A194/73 wef 1 June 1973). In my considered view the Courts will not be performing their functions judiciously if the seriousness of the situation is not reflected in the sentence imposed or if the sentence appears to defeat the object of the statute. The imprisonment imposed would not only have some effect on the offender but also serve as a deterrent. This in turn would provide an opportunity, indeed a rare opportunity, to the Prisons Department of trying to remedy such defect of character as there may be. Or as Eusoffee Abdoolcader J (as he then was) succinctly said in the case of *PP v. Teh Ah Cheng* [1976] 2 MLJ 187:

> ... the creaking of the prison doors closing shut behind him will afford the respondent ample opportunity to ponder on his folly in the company he keeps, and give others of his ilk and equally gullible, cause to reflect on the desirability of the company they should or rather should not keep ...

I am mindful of the case of *Liow Chow & Anor. v. PP* [1939] 8 MLJ 170 where it was held that:

> The sentence of the Court of first instance should not be altered unless the appellate Court considers the sentence unjust. An appellate Court must reject "the lore of nicely calculated less or more" in matters of sentence. Before the sentence is altered it must be manifestly wrong, wrong either in the sense of being illegal or of being unsuitable to the proved facts and circumstances.

In the same vein Buhagiar J in the case of *PP v. Fam Kim Hock* [1957] 23 MLJ 20 said:

> It is an established principle that the sentence of the Court of first instance should not be altered unless it is manifestly wrong, wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances.

On the question of sentence the Courts invariably take certain factors into consideration - the first and foremost being the public interest. Then the age of the offender, his health, his character and background, the nature of the offence and the circumstances and the manner in which the offence is committed. The Courts are duty bound to consider all these matters before deciding upon a suitable sentence or a sentence according to law. Thus, on an appeal on sentence from the Subordinate Courts the High Court will not interfere with the sentence imposed unless it can be shown to its satisfaction that in the circumstances of the particular case the sentence was manifestly excessive or inadequate or that in fixing the sentence the subordinate Courts had failed to adequately consider all relevant factors either for or against the offender.

In the instant appeal, the learned Magistrate took into account the following factors before passing sentence, *viz*:

(1) the facts of the case, the mitigation plea and the previous conviction record of the respondent;

(2) the plea of guilty by the respondent and the consequential saving of time and money (see *Saw Soo Kim v. PP* [1975] 2 MLJ 134 where Lee Hun Hoe CJ Borneo stressed that by pleading guilty it "not only saves the country a great expense of a lengthy trial but also saves time and inconvenience of many, particularly the witness.");

(3) the plea of guilty as a mitigating factor. (This is often accepted by the Courts - see *Melvani v. PP* [1971] 1 MLJ 137 where Wee Chong Jin CJ Singapore said: "In principle I consider it proper that where an accused person pleads guilty the Court in assessing sentence ought to consider such a plea as a mitigating factor.")

The learned Magistrate also stated that "a tooth for a tooth, and an eye for an eye" concept no longer plays a part in our criminal law. I entirely agree with him. Lawton LJ in *James Henry Sergeant* said:

> The old testament concept of an eye for an eye and tooth for tooth no longer plays any part in our criminal law.

The learned Deputy Public Prosecutor contended that the respondent is a hardened criminal with a string of drug convictions (to be exact five in number). The period of imprisonment should be enhanced as the respondent appeared not to have profited from his previous sojourn in prison. *PP v. Zaini* [1964] 30 MLJ 221 was cited in support of the learned Deputy's contention. I must at once say that the facts in *Zaini's* case is entirely different from the instant appeal. The respondent in *Zaini's* case was charged with giving false evidence before a kathi when he applied to get married. The respondent stated to the kathi in a judicial proceeding that he was a bachelor when in fact he was a married man. The respondent pleaded guilty to an offence under s. 193 of the Penal Code and was sentenced to 1 day's

imprisonment and a fine of RM150 by the district Judge. On appeal the High Court altered the sentence to one of imprisonment for six months for the simple reason that the respondent had a previous conviction for a similar offence where he had been treated lightly but appeared to have not profited by it.

Next, the learned Deputy cited *PP v. Jafa bin Daud* [1981] 1 MLJ 315 where Mohamed Azmi J (as he then was) explained the meaning of "sentence according to law". His Lordship said:

> A 'sentence according to law' means that the sentence must not only be within the ambit of the punishable section, but it must also be assessed and passed in accordance with established judicial principles.

By citing *Jafa's* case the learned Deputy was making a comparison wherein his Lordship enhanced the sentence from eight months' imprisonment to eighteen months' imprisonment for an offence under s. 12(2) of the Dangerous Drugs Act No. 30 of 1952 (Revised 1980) and consequently the learned Deputy urged this Court to do likewise. Incidentally the respondent in *Jafa's* case had five previous convictions - two of which were connected with drugs whilst the other three involved thefts.

On the other hand the respondent contended that he had served the sentence imposed by the learned Magistrate, Magistrate's Court, Selama, Perak. He contended that the hearing of the appeal was too late in the day. The appeal should have been fixed for hearing while he was serving his term at Taiping Prisons. The respondent unabashedly admitted that he is a hardened criminal and currently undergoing imprisonment at Pulau Pinang Prisons for a drug offence. According to the respondent he is currently serving a four year jail term imposed by the Butterworth Magistrate's Court wef 6 February 1991 and would be freed on 6 October 1993 (confirmed by the learned Deputy). However, one must not lose sight of the fact that a plea of guilty of a hardened criminal must be treated as a mitigating factor (see *Saw Soo Kim v. PP* [1975] 2 MLJ 134 where Lee Hun Hoe J (as he then was) said:

> Whether a person is a hardened criminal or not, I feel that a plea of guilty should be treated as a mitigating factor.

There is one other matter to be considered, *viz*. the one year of police supervision order commencing immediately after the expiration of the two years imprisonment. The learned Deputy did not address me on it. Now there are three conditions under s. 295(1) of the Criminal Procedure Code that must be present before the Magistrate could apply the power set out thereunder. They are:

(a) the offender must have been convicted of an offence previously;

(b) that previous offence is one punishable with imprisonment for a term of two years or upwards; and

(c) the offence which the offender is presently convicted of is also one punishable with imprisonment for a term of two years or upwards.

What are the obligations of the respondent under the police supervision order? They are clearly spelt out in s. 296 of the Criminal Procedure Code. Briefly, the respondent has to notify the place of his residence to the officer in charge of the police district (OCPD) in which his residence is situated; he has to notify any change of residence to the OCPD; he has to notify the OCPD in the old and new police districts should he change his residence to a new police district; when the change is to a place outside the federation, he has to inform the OCPD in the district which he is leaving; should he return to the federation, he has to notify the OCPD the district he wishes to reside. In addition to the above, the

respondent shall also report personally once in each month at a specified time as is prescribed by the Chief Police Officer (CPO) of the state in which he resides - either to the CPO himself or to such other person as that officer directs.

There are three instances wherein the respondent can be said to be in breach of the supervision order. They are (see s. 297 of the Criminal Procedure Code):

(a) when the respondent remains in any place for 48 hours without notifying the place of his residence to the OCPD in which such place is situated;

(b) when the respondent fails to comply with the requisitions of s. 296 of the Criminal Procedure Code in relation to any change of residence; or

(c) when he fails to comply with the requisitions pertaining to monthly reporting to the CPO or any other person as the CPO directs.

In *Abdul Wahab v. PP* [1970] 2 MLJ 203 the High Court only enhanced the imprisonment sentence from two years to ten years but it chose not to enhance the period of police supervision of one year because a Magistrate's Court can only order it for one year.

In *PP v. Haled* [1981] 2 MLJ 211 the High Court ordered police supervision for two years because "having regard to his previous convictions and also in order to curtail his tendency to promote himself to a more serious crime".

In *Zakariya bin Man v. PP* [1985] 2 MLJ 221 the one year police supervision period was confirmed by the appellate Court for an offence of theft of a motor-car.

In *Roslan bin Haji Yahyav v. PP* [1985] 2 MLJ 218 Gunn Chit Tuan J (as he then was) set aside the police supervision order as his Lordship thought that it was not justified. His Lordship approved the *dictum* of Rigby J in *Re Bakar bin Ahmad* [1959] MLJ 256:

> Police supervision should not be imposed by way of as additional punishment. Its sole object and only justification, as I understand it, is to ensure that in the interests of public security the police are in a position to exercise some measure of control over the movements and activities of persons of known bad character - such as burglars, pickpockets and common thieves - who habitually and consistently lead a life of criminal dishonesty.

Usage of supervision orders should be sparingly used by Magistrates and should likewise be restricted to the most appropriate or suitable cases. Thus, in the instant appeal, the order of one year of police supervision commencing immediately after the expiration of the two years' imprisonment passed by the learned Magistrate is solely to curtail the respondent's tendency to promote himself to a more serious crime and in the circumstances and appropriate. The respondent's previous drug convictions further merit an imposition of the one year's police supervision.

There is nothing on record to show that the learned Magistrate had erred in sentencing the respondent. Everything relevant was taken into account by the learned Magistrate. The sentence imposed was in the circumstances according to law. Considering the background of the respondent it is my considered view that the sentence imposed by the learned Magistrate should not be disturbed. The appeal by the Public Prosecutor is dismissed and the sentence of the learned Magistrate is accordingly affirmed.

Also found at [1992] 4 CLJ 2283